Supreme Court, U.S.
FILED
JAN 18 1983
ALEXANDER L. STEVAS

No. 82-118

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

CROWN, CORK & SEAL CO., INC., *Petitioner*,

v.

THEODORE PARKER, *Respondent*.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN SUPPORT OF RESPONDENT BY JACK WILLIAMS AND JERRY POWELL AS *AMICI CURIAE*

JAMES W. WITHERSPOON
WITHERSPOON, AIKIN & LANGLEY
140 East Third Street
Hereford, Texas 79045
(806) 364-1100
Attorneys for Amici Curiae Jack Williams and Jerry Powell

Of Counsel:
JAMES E. ELLIOTT
BARBARA L. EMERSON

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

Does the pendency of a proposed class action toll the statutes of limitations for all members of the proposed class?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI CURIAE	2
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. The Equitable Principles of *American Pipe* Apply With Equal Force When A Putative Class Member Seeks To Initiate Separate Proceedings	6
II. The Factual Circumstances Of Potential Class Action Litigation Is Repugnant To Inflexible Application Of An "Intervention Only" Rule	10
CONCLUSION	17
ADDENDUM:	
Letters Pursuant To Rule	1a-2a

TABLE OF AUTHORITIES

CASES: Page

Agostine v. *Sidcon Corp.*, 21 F.R.Serv.2d 329 (E.D.Pa. 1975) 9

American Pipe and Construction Co. v. *Utah*, 414 U.S. 538 (1974), *rehearing denied*, 415 U.S. 952 (1974) ..... *passim*

Appleton Electric Company v. *Graves Truck Lines, Inc.*, 635 F.2d 603 (7th Cir. 1980), *cert. denied*, 451 U.S. 976 (1981) 9

Bantolina v. *Aloha Motors, Inc.*, 419 F.Supp. 1116 (D.Hawaii 1976) 9

Barnett v. *U.S. Civil Service Commission*, 439 F.Supp. 216 (D.D.C. 1977) 14

Buford v. *American Finance Company*, 333 F.Supp. 1243 (N.D.Ga. 1971) 12

Chisholm v. *United States Postal Service*, 665 F.2d 482 (4th Cir. 1981) 13

Cleveland v. *Palmby*, No. CIV-71-731, (W.D.Okla., filed October 24, 1972) 2

Dickerson v. *United States Steel Corporation*, 22 F.R.Serv.2d 866 (E.D.Pa. 1976) 13

Duran v. *Credit Bureau of Yuma, Inc.*, 93 F.R.D. 607 (D.Ariz. 1982) 9

Eisen v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974) .*passim*

Galloway v. *American Brands, Inc.*, 81 F.R.D. 580 (E.D.N.C. 1978) 9

Gramby v. *Westinghouse Electric Corporation*, 84 F.R.D. 655 (E.D.Pa. 1979) 9, 13

Green v. *United States Steel Corporation*, 481 F.Supp. 295 (E.D.Pa. 1979) 9

Gulf Oil Company v. *Bernard*, 452 U.S. 89 (1981) . 3, 4, 12

Haas v. *Pittsburgh National Bank*, 526 F.2d 1083 (3rd Cir. 1975) 8

Hellerstein v. *Mather*, 360 F.Supp. 473 (D.Colo. 1973), *appeal dismissed sub nom. Hellerstein* v. *Mr. Steak*, 531 F.2d 470 (10th Cir. 1976) 13

Table of Authorities Continued

Page

In Re Home-Stake Production Company Securities Litigation, 76 F.R.D. 337 (N.D.Okla. 1975) 9, 12

Illinois Brick Co. v. *Illinois*, 431 U.S. 720, *rehearing denied*, 434 U.S. 881 (1977) 3, 11

Issen v. *GSC Enterprises, Inc.*, 538 F.Supp. 745 (N.D.Ill. 1982) 9

J.H. Cohn & Co. v. *American Appraisal Associates, Inc.*, 628 F.2d 994 (7th Cir. 1980) 11, 13

Laventhall v. *General Dynamics Corp.*, 91 F.R.D. 208 (E.D.Mo. 1981) 9, 12

Luevano v. *Campbell*, 93 F.R.D. 68 (D.D.C. 1981) ... 14

McAlpine v. *AAMCO Automatic Transmissions, Inc.*, 24 F.R.Serv.2d 275 (E.D.Mich. 1977) 9

McCarthy v. *Kleindienst*, 562 F.2d 1269 (D.C.Cir. 1977) 7

Muntz v. *Ohio Screw Products*, 61 F.R.D. 396 (N.D.Ohio 1973) 12

Nelson v. *United Credit Plan, Inc.*, 77 F.R.D. 54 (E.D.La. 1978) 9

Nguyen Da Yen v. *Kissinger*, 602 F.2d 925 (9th Cir. 1979) 8, 12

Order of Railroad Telegraphers v. *Railway Express Agency, Inc.*, 321 U.S. 342 (1944) 6

Parker v. *Bell Helicopter Company*, 78 F.R.D. 507 (N.D.Texas 1978) 9, 13

Parker v. *Crown, Cork and Seal Co., Inc.*, 677 F.2d 391 (4th Cir. 1982), *cert. granted*, No. 82-118 (Nov. 8, 1982) 8

Pavlak v. *Church*, 681 F.2d 617 (9th Cir. 1982), *petition for cert. docketed*, No. 82-650 (filed Oct. 12, 1982) 9

Pearson v. *Ecological Science Corporation*, 522 F.2d 171 (5th Cir. 1975), *cert. denied sub nom. Skydell* v. *Ecological Science Corporation*, 425 U.S. 912 (1976) 12

Pruitt v. *Allied Chemical Corp.*, 28 F.R.Serv.2d 903 (E.D.Va. 1980) 12, 13

Rothman v. *Gould*, 52 F.R.D. 494 (S.D.N.Y. 1971) .. 12

Table of Authorities Continued

Page

Saitterwhite v. *City of Greenville, Texas*, 578 F.2d 987 (5th Cir. 1978), *vacated on other grounds*, 445 U.S. 940 (1981) 9

Sanders v. *John Nuveen & Co., Inc.*, 524 F.2d 1064 (7th Cir. 1975), *vacated on other grounds sub nom. John Nuveen & Co., Inc.* v. *Sanders*, 425 U.S. 929 (1976), *cert. denied*, 450 U.S. 1005 (1981) 8, 9

Spearman v. *Continental Grain Company*, No. CA2-1330 (N.D.Texas, filed January 2, 1973) 2, 4, 5

Susman v. *Lincoln American Corp.*, 587 F.2d 866 (7th Cir. 1978), *cert. denied*, 445 U.S. 942 (1981) 11

Stoddard v. *Ling-Temco-Vought, Inc.*, 513 F. Supp. 314 (C.D.Calif. 1981) 8

Trim v. *Restaurant Marketing Associates, Inc.*, 28 F.R.Serv.2d 683 (N.D.Cal. 1979) 8, 9

United Airlines, Inc. v. *McDonald*, 432 U.S. 385, *rehearing denied*, 434 U.S 989 (1977) 7, 9

Wetzel v. *Liberty Mutual Insurance Company*, 508 F.2d 239 (3rd Cir. 1975), *cert. denied sub nom. Liberty Mutual Insurance Company* v. *Wetzel*, 421 U.S. 1011 (1975) 13

In Re Wheat Farmers Antitrust Class Action Litigation, 366 F. Supp. 1087 (J.P.M.L. 1973) 2

In Re Wheat Farmers Antitrust Class Action Litigation, M.D.L. No. 129 (W.D.Okla.) 14

In Re Wheat Farmers Antitrust Class Action Litigation, M.D.L. No. 452 (W.D.Okla.) 2, 14

Williams v. *Continental Grain Company*, No. CA2-80-202, (N.D.Texas, filed October 14, 1980) 4, 5

Woodson v. *Fulton*, 614 F.2d 940 (4th Cir. 1979) 13

Yaffe v. *Detroit Steel Corp.*, 50 F.R.D. 481 (N.D. Ill. 1970) 12

Zinser v. *Continental Grain Company*, ___ U.S. ___, 102 S.Ct. 1434 (1982) (*cert. denied*) 2, 4

Zinser v. *Continental Grain Company*, 660 F.2d 754 (10th Cir. 1982), *cert. denied*, ___ U.S. ___, 102 S.Ct. 1434 (1982) 4, 15

Table of Authorities Continued

Page

Zinser v. *Continental Grain Company*, No. CA2-1309 (N.D. Texas, filed November 16, 1972) 2, 4, 5

STATUTES AND RULES:

28 U.S.C. § 1407, *et seq.*(1976) 10

Fed. R. Civ. P. 23 ..... *passim*

Fed. R. Civ. P. 24 ..... 10, 14, 16

OTHER AUTHORITIES:

Developments in the Law—Class Actions, 89 Har.L.Rev. 1318 (1976) 11

Comment, *Involuntary Dismissals of Class Actions*, 40 U.Chi.L.Rev. 783 (1973) 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-118

CROWN, CORK & SEAL CO., INC., *Petitioner*,

v.

THEODORE PARKER, *Respondent*.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN SUPPORT OF RESPONDENT BY JACK WILLIAMS AND JERRY POWELL AS *AMICI CURIAE*

Jack Williams and Jerry Powell submit this Brief as *amici curiae* with the consent of both parties hereto.[1] Jack Williams and Jerry Powell urge this Court to follow the intent of this Court in *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974) *rehearing denied* 415 U.S. 952 (1974) and *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), and allow the tolling of the statute of limitations on behalf of all putative class members who may desire to, or by necessity be required to, bring independent causes of action.

[1] Jack Williams and Jerry Powell submit with this Brief two letters of consent, one from each party to this appeal, copies of which are found in the accompanying Addendum.

INTEREST OF AMICI CURIAE

Jack Williams and Jerry Powell are two of the numerous plaintiffs who were sellers of wheat to Continental Grain Company ("Continental") in 1972 involved in an antitrust action coordinated for discovery and pre-trial purposes before the Honorable Frederick Daugherty, United States District Judge, under the style of *In Re Wheat Farmers Antitrust Class Action Litigation*, M.D.L. No. 452 (W.D. Okla).

In 1972 Joe Zinser and John Spearman filed separate class actions[2] in United States District Court for the Northern District of Texas, alleging that Continental and Clarence Palmby had combined and conspired to violate the antitrust laws in the wheat market and the sale of wheat to the Soviet Union in 1972.

The two actions were consolidated by the Judicial Panel on Multidistrict Litigation for discovery and pre-trial proceedings in the United States District Court for the Western District of Oklahoma where a similar suit, *Cleveland* v. *Palmby*, CIV-72-731 (W.D.Okla. filed Oct. 24, 1972), also a class action, was pending.[3]

---

[2] *Zinser* v. *Continental Grain Company*, No. CA2-1309 (N.D.Texas) ("Zinser") was filed on November 16, 1972, on behalf of certain Texas wheat farmers; *Spearman* v. *Continental Grain Company*, No. CA2-1303 (N.D.Texas) ("Spearman") was filed on January 2, 1972 on behalf of certain New Mexico wheat farmers.

See also, Zinser v. *Continental Grain Company*, No. 81-1021 (Petition for Writ of Certiorari filed December 1, 1981).

[3] *See In Re Wheat Farmers Antitrust Class Action Litigation*, 366 F. Supp. 1087 (J.P.M.L. 1973).

On June 30, 1975, the trial court certified the classes in each of the three lawsuits. Notice was given to class members in December of 1975. Discovery on the merits progressed until, in 1977, this Court rendered its decision in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, *rehearing denied*, 434 U.S. 881 (1977).

On June 25, 1979, the trial court entered an order holding, *inter alia*, *Illinois Brick* applied to all the claims in all three cases, and determining that *Illinois Brick* precluded antitrust claims brought by those who did not sell directly to Continental. Accordingly, the district court entered an order dismissing from the classes certified in these actions those members who did not sell directly to the conspirators; reevaluated the propriety of affording the litigation class action treatment and found that the classes remaining did not meet the numerousity requirement of Fed. R. Civ. P. 23(a)(1); and entered an order and judgment dismissing the action without prejudice. After entertaining motions and entering an order, final judgment was entered, enforcing the court's order on November 13, 1979, which dismissed all indirect sellers with prejudice and all direct sellers without prejudice. No notice of the dismissal was provided to the certified class members; the trial court enforced a local rule, of the type found unconstitutional by this Court in *Gulf Oil Company* v. *Bernard*, 452 U.S. 89 (1981), preventing the attorneys from communicating with putative class members and informing members of their rights; and, since the named class representatives were indirect sellers, substitute parties, Messrs. Williams and Borden, were only allowed to intervene for purposes of the class issue, and their claims were subsequently dismissed without prejudice. The litigation accordingly ceased its existence on the district court level.

The United States Court of Appeals for the Tenth Circuit affirmed,[4] and this Court denied the petition for a writ of certiorari.[5]

On October 14, 1980, a class action was filed in the United States District Court for the Northern District of Texas by the parties who, in 1979, sought to intervene in the *Zinser* and *Spearman* cases, each presenting identical claims as asserted in the original actions and seeking to represent as a class direct sellers to Continental.[6] By order of June 12, 1981, the class issues were dismissed.

Subsequent to the Court's ruling in *Gulf Oil Company* v. *Bernard*, 452 U.S. 89 (1981) the trial court permitted communications and eighty-one individuals sought intervention into the *Williams* litigation. By order of October 21, 1982, leave to intervene was granted. On March 26, 1981, Continental filed a motion to dismiss on the grounds that the action was barred by the statute of limitations claiming that, since no intervention was had in the *Zinser* and *Spearman* cases, all the named and intervening plaintiffs in *Williams* lost their claims by the filing of a new action after the dismissal without prejudice. The motion is currently *sub judice*.

Both Jack Williams and Jerry Powell do not have a direct interest in the outcome of this appeal; rather, their interest in the *Williams* case may be affected by this

---

[4] *Zinser* v. *Continental Grain Company*, 660 F.2d 754 (10th Cir. 1981), *cert. denied*, ___ U.S. ___, 102 S.Ct. 1434 (1982).

[5] *Zinser* v. *Continental Grain Company, No. 81-1021*, ___ U.S. ___, 102 S.Ct. 1434 (1982).

[6] *Williams* v. *Continental Grain Company, No. CA2-80-202*, (N.D.Texas, filed October 14, 1980) ("Williams").

appeal's outcome. Jack Williams was a party seeking to intervene as a substitute class representative in *Zinser* and is a named plaintiff in the *Williams* case. Jerry Powell was a class member in *Zinser* and is an intervenor in the *Williams* case.

In addition, Jack Williams and Jerry Powell respectfully submit this brief as *amici curiae* to the Court to express their interests in the issue of tolling the statute of limitations for putative class members from the perspective of antitrust plaintiffs desirous of opposing any possible deterioration of existing Rule 23 mechanisms and putative class members' rights.

SUMMARY OF ARGUMENT

The issue presented in this appeal is whether the Court should accept a restrictive interpretation of *American Pipe and Construction Co.* v. *Utah*, 414 U.S. 538, *rehearing denied* 415 U.S. 952 (1974) and *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), requiring mandatory intervention into the pending class action litigation as the only means of affording a putative class member the right to toll the statute of limitations. *Amici curiae* Jack Williams and Jerry Powell respectfully submit that it does not offend, but rather advances, the equitable principles and policy reasons of *American Pipe* and *Eisen* by allowing a putative class member to protect his or her claim by the filing of a separate lawsuit. Such an inflexible and constrained policy as suggested by Petitioner is contrary to equitable principles where a party opposing class certification is given notice and is fully cognizant of the claims of putative class members. Petitioner's position ignores the potential problems associated with a rigid requirement providing a putative class member, with peculiar factual circumstances, with only one method of ventilating his or her claim. Allowance of intervention as

the sole mechanism for a putative class member to avail oneself of the tolling of the statute of limitations may open a Pandora's box of further procedural complexities and due process problems.

ARGUMENT

I. The Equitable Principles Of *American Pipe* Apply With Equal Force When A Putative Class Member Seeks To Initiate Separate Proceedings.

Since the statutes of limitations are designed to enforce the maxim "*vigilantibus non dormientibus acquitas subvenit*"[7] and "to promote justice by preventing surprise through revival of claims that have been allowed to slumber until evidence has been lost, memories faded and witnesses have disappeared," *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944), the Court, in *American Pipe and Construction Co.* v. *Utah*, 414 U.S. 538, *rehearing denied* 415 U.S. 952 (1974), addressed the issue of the tolling of statutes of limitations by the filing of a class action by stating:

> The policies of ensuring essential fairness to defendants and of barring a plaintiff who "has slept on his rights," *Burnett* v. *New York Central R. Co.*, 380 U.S. 424, 428, 85 S.Ct. 1050, 1054, 13 L.Ed.2d 941, are satisfied, when, as here, a named plaintiff who is found to be representative of a class commences a suit and thereby notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment.

Id. at 554-55. Accordingly, the Court applied these equitable principles and found that the commencement of a

---

[7] "Equity aids the vigilant, not those who slumber on their rights."

class action tolls the running of the statute for all putative class members who would have been parties had the action been permitted to continue under Federal Rule Civil Procedure 23. *Id.* at 554.

The Court further expanded these principles in, albeit *dictum*, *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 117 n. 13 (1974):

> Petitioner also argues that class members will not opt out because the statute of limitations has long since run out on the claims of all class members other than petitioner. This contention is disposed of by our recent decision in American Pipe & Construction Co. v. Utah, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974), which established that commencement of a class action tolls the applicable statute of limitations as to all members of the class.

The equitable principles espoused by the Court in *American Pipe* and *Eisen* are consistent with the design of the statute of limitations. By the filing of a class action, the defendant has been given notice of the "essential information necessary to determine both the subject matter and the size of the prospective litigation . . ." 414 U.S. at 555. Federal Rule of Civil Procedure 23 mandates that the class action issue be determined "[a]s soon as practicable after the commencement of an action." Fed.R.Civ.P. 23(c)(1). By the time the motion for certification is ripe for determination, the party opposing certification is not only informed of the number of putative class members but is aware of the members identities, of their substantive claims and of the potential exposure for the individual claims of the class members.[8] A defendant opposing class

---

[8] *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 395, *rehearing denied*, 434 U.S. 989 (1977); *McCarthy* v. *Kleindienst*, 562 F.2d 1269,

certification cannot later be heard to cry "stale claim" and attempt to invoke the limitations defense when a previously identified putative class member seeks to intervene. There can be no surprise. 414 U.S. at 555. *Accord, Haas* v. *Pittsburgh National Bank*, 526 F.2d 1083, 1097 n. 19 (3rd Cir. 1975); *Sanders* v. *John Nuveen & Co., Inc.*, 524 F.2d 1064, 1074 n. 28 (7th Cir. 1975) *vacated on other grounds sub nom. John Nuveen & Co., Inc.* v. *Sanders*, 425 U.S. 929 (1976), *cert. denied*, 450 U.S. 1005 (1981); *Trim* v. *Restaurant Marketing Associates, Inc.*, 28 F.R.Serv.2d 683 (N.D.Cal. 1979).

Petitioner suggests that the *only* means of preserving the right to toll the statute of limitations is to intervene in the pending lawsuit brought as a class action. It is proffered that any other action by a putative class member dispenses with the member's rights as preserved in *American Pipe* and *Eisen*. However, such restrictive reading of *American Pipe* and *Eisen* is tantamount to advancing form over substance. *American Pipe* emphatically preserved the tolling right of putative members to intervene in the class action. Under the Court's rationale, the tolling of the statute of limitations for one putative class member tolls the limitations statute for all members regardless of any subsequent and unrelated action taken by the putative class member. Accordingly, when the statute is tolled for intervention purposes, the same equitable rationale extends to any other filing purpose. *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. at 176 n. 13.[9]

1273-74 (D.C.Cir. 1977); *Stoddard* v. *Ling-Temco-Vought, Inc.*, 513 F. Supp. 314, 335 (C.D.Cal. 1981); *Trim* v. *Restaurant Marketing Associations, Inc.*, 28 F.R.Serv.2d 683 (N.D.Cal. 1979).

[9] *See Parker* v. *Crown, Cork and Seal Co., Inc.*, 677 F.2d 391 (4th Cir. 1982), *cert. granted*, No. 82-118 (Nov. 8, 1982); *Nguyen Da Yen*

Federal Rule of Civil Procedure 23(c)(2)(A) affords an analogous situation where a putative class member "opts out" of the litigation, and is still afforded the protection of tolling the limitations statute. *Appleton Electric Company* v. *Graves Truck Line, Inc.*, 635 F.2d 603 (7th Cir. 1980), *cert. denied* 451 U.S. 976 (1981). Under Rule 23(c)(2)(A), either the opt out can lay to rest his claim, or timely file his own action without confronting the statute of limitations bar. *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. at 176 n.13.[10] Holding that putative class members

---

v. *Kissinger*, 602 F.2d 925 (9th Cir. 1979); *Saitterwhite* v. *City of Greenville*, 578 F.2d 987, 996-97 (5th Cir. 1978) *vacated on other grounds*, 445 U.S. 940 (1980); *Sanders* v. *John Nuveen & Co., Inc.*, 524 F.2d 1064, 1074 n.28 (7th Cir. 1975); *Issen* v. *GSC Enterprises, Inc.*, 538 F. Supp. 745, 754 (N.D.Ill. 1982); *Laventhall* v. *General Dynamics Corporation*, 91 F.R.D. 208, 210 (E.D.Mo. 1981); *Gramby* v. *Westinghouse Electric Corporation*, 84 F.R.D. 655, 662 (E.D.Pa. 1979); *Green* v. *United States Steel Corporation*, 481 F. Supp. 295, 299 (E.D.Pa. 1979); *Trim* v. *Restaurant Marketing Associates, Inc.*, 28 F.R.Serv.2d 683 (N.D.Cal. 1979); *Galloway* v. *American Brands*, 81 F.R.D. 580, 588 (E.D.N.C. 1978); *Parker* v. *Bell Helicopter*, 78 F.R.D. 507, 513 n.2 (N.D.Texas 1978); *Nelson* v. *United Credit Plan, Inc.*, 77 F.R.D. 54, 58 (E.D.La. 1978); *In Re Home-Stake Production Company Securities Litigation*, 76 F.R.D. 337, 345 (N.D.Okla. 1975). *E.g.*, *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 402 (1977) (Powell, J., dissenting); *Pavlak* v. *Church*, 681 F.2d 617, 621-22 (9th Cir. 1982) (Norris, J., dissenting), *petition for cert. docketed*, No. 82-650 (filed Oct. 12, 1982).

[10] *See Duran* v. *Credit Bureau of Yuma, Inc.*, 93 F.R.D. 607, 610 (D.Ariz. 1982); *McAlpine* v. *AAMCO Automotive Transmissions, Inc.*, 24 F.R.Serv.2d 275, 276-77 (E.D.Mich. 1977); *Bantolina* v. *Aloha Motors, Inc.*, 419 F. Supp. 1116, 1121-22 n.19 (D.Hawaii 1976); *Agostine* v. *Sidcon Corp.*, 21 F.R.Serv.2d 329, 338 n.13 (E.D.Pa. 1975). *Cf. Pavlak* v. *Church*, 681 F.2d at 621-622 (Norris, J., dissenting).

must intervene into the pending action would defeat the opt-out provision of Fed.R.Civ.P. 23(c). For the purpose of tolling the statute of limitations, there is no rationale for distinguishing treatment of a putative class member seeking to initiate suit from that of a traditional opt-out who seeks to initiate suit; the equitable principles of tolling apply equally.[11]

II. The Factual Circumstances Of Potential Class Action Litigation Is Repugnant To Inflexible Application Of An "Intervention Only" Rule.

Respondent advances a strict and limited application of the tolling principle of *American Pipe*—failure to intervene, at any point in the litigation, mandates a bar to the claim by the statute of limitations, regardless of the circumstances of the litigation and defendant's knowledge of the putative class member's identity. Situations peculiar to each pending litigation, however, dictate the necessity of a flexible principle which would allow either intervention or initiation of a new suit.

One such instance is where intervention is denied. Since Respondent's intended mandatory intervention would require a motion under Federal Rule of Civil Procedure 24(b), the putative member of the class would have to weigh a decision to run the risk of a denial of a motion for permissive intervention (a motion which, during deliberation by the district court, would not toll the

---

[11] As to concerns for assuring "effectuation of the purposes of litigative efficiency and economy" of Fed.R.Civ.P. 23, *American Pipe and Construction Co.* v. *Utah*, 414 U.S. at 556, the Judicial Panel on Multidistrict Litigation has ample procedures and rules affording consolidation for discovery and pre-trial proceedings. 28 U.S.C. § 1407, *et seq.* (1976).

limitations statute) or filing a new action which would toll the statute. *See American Pipe and Construction Co.* v. *Utah*, 414 U.S. 538, 561 (1974), *rehearing denied*, 415 U.S. 952 (1977) (Blackmun, J., dissenting) ("Nor does [our decision] necessarily guarantee intervention for all members of the purported class."); *J.H. Cohn & Co.* v. *American Appraisal Associates, Inc.*, 628 F.2d 994, 996 (7th Cir. 1980) (reversal of district court's dismissal of new action, after intervention into first action had been denied).

Nor would mandatory intervention advance the equitable principles of *American Pipe* in situations involving dismissal of the class action. Where the district court dismisses all claims, the putative class members are left with no alternative but to file an independent action or be barred by the statute of limitations.[12] The rationale for tolling the statute of limitations as to all putative members, regardless of subsequent action taken for protection of their claims, applies.[13]

---

[12] Such was the situation involving these *amici curiae*. When Mr. Williams sought intervention but was denied, he had no alternative but to file an independent action since all claims by indirect sellers to Continental, under *Illinois Brick*, were dismissed without prejudice. By ordering dismissal without prejudice, the Court, in essence, invited the initiation of the *Williams* action.

Mr. Powell, along with the other putative class members, was not notified of the dismissal without prejudice and only became aware of the *Williams* case after the Court decided *Bernard* and the district court allowed communications with the putative class members.

[13] *See, generally, Sussman* v. *Lincoln American Corp.*, 587 F.2d 866 (7th Cir. 1978), *cert. denied*, 445 U.S. 942 (1981); *Developments in the Law—Class Actions*, 89 Harv.L.Rev. 1318, 1540-41 (1976).

Putative class members reliance on the maintenance of the class action would be compromised by dismissal of the class claims, before or after certification, where no notice of the dismissal was provided,[14] or communications with the putative class members prohibited.[15]

Moreover, dismissal, settlement or compromise of the class suit, without notice to putative class members, would be detrimental to those persons who relied upon the class action as the primary means of vindicating their legal claims.[16]

---

[14] *Cf. Laventhall* v. *General Dynamics Corporation*, 91 F.R.D. 208, 210 (E.D.Mo. 1981) (no pre-certification notice needed where putative members are not prejudiced); *Pruitt* v. *Allied Chemical Corp.*, 28 F.R.Serv.2d 903, 922 (E.D.Va. 1980) (statute of limitations will be tolled "where there was apparent relevance by the absent class members on the pendency of the purported class action."); *In Re Home-Stake Production Company Securities Litigation*, 76 F.R.D. 337 (N.D.Okla. 1975) (putative class members allowed to file independent claims without being barred by limitations when claims founding the original class action were settled); *Buford* v. *American Finance Company*, 333 F. Supp. 1243, 1252 (N.D.Ga. 1971) (court allows putative class members to prove reliance on class action in order to save claims from limitation statute).

[15] *See Gulf Oil Company* v. *Bernard*, 452 U.S. 89 (1981).

[16] *See Nguyen Da Yen* v. *Kissinger*, 602 F.2d 925 (9th Cir. 1979); *Muntz* v. *Ohio Screw Products*, 61 F.R.D. 396, 398 (N.D.Ohio 1973); *Rothman* v. *Gould*, 52 F.R.D. 494, 496 (S.D.N.Y. 1971); *Yaffe* v. *Detroit Steel Corp.*, 50 F.R.D. 481, 483 (N.D.Ill. 1970); Comment, *Involuntary Dismissals of Class Actions*, 40 U.Chi.L.Rev. 783, 801-04 (1973). *See, generally, Pearson* v. *Ecological Science Corp.*, 522 F.2d 171, 177 (5th Cir. 1975) (court recognized the pendency of three actions brought by members of the putative class).

Mandatory intervention would also not be warranted in an alleged class action where the named class representatives could not adequately represent the putative class,[17] where the interests of the named and putative class parties are antagonistic or in conflict,[18] where the putative class members claims are not included in the certified class or certification is denied,[19] or where the inclusion of a claim was denied due to its lack of commonality to other putative class members.[20] The claims of the putative class

---

[17] *See generally, Woodson* v. *Fulton*, 614 F.2d 940, 942 (4th Cir. 1980) (definition of the scope of the class precludes Woodson's claim and, therefore, his independent action will be preserved); *Gramby* v. *Westinghouse Electric Corporation*, 84 F.R.D. 655, 662 (E.D.Pa. 1979) (second class action not barred by limitations where claims of second class action's members were excluded from the original certified class action by court); *Dickerson* v. *United States Steel Corp.*, 22 F.R.Serv.2d 866, 868 (E.D.Pa. 1976) (where putative class members were excluded from class, court will provide notice of exclusion).

[18] *See, generally, Pruitt* v. *Allied Chemical Corp.*, 28 F.R.Serv.2d 903, 922 (E.D.Va. 1980) (putative class members who were excluded from class for reasons of manageability will be able to avail themselves of the toll of the limitations statute afforded by class action filing); *Parker* v. *Bell Helicopter Co.*, 78 F.R.D. 507, 513 n.2 (N.D.Texas 1978) (unrepresented members could initiate own action).

[19] *See, generally, Chisholm* v. *United States Postal Service*, 665 F.2d 482, 490-91 (4th Cir. 1981); *J.H. Cohn & Co.* v. *American Appraisal Associates, Inc.*, 628 F.2d 994 (7th Cir. 1980); *Wetzel* v. *Liberty Mutual Insurance Company*, 508 F.2d 239, 246 (3rd Cir. 1975), *cert. denied sub nom. Liberty Mutual Insurance Company* v. *Wetzel*, 421 U.S. 1011 (1975); *Hellerstein* v. *Mather*, 360 F. Supp. 473 (D.Colo. 1973), *appeal dismissed sub nom. Hellerstein* v. *Mr. Steak*, 531 F.2d 470 (10th Cir. 1976).

[20] *See, generally, Woodson* v. *Fulton*, 614 F.2d 940 (4th Cir. 1980). *Cf. Chisholm* v. *United States Postal Service*, 665 F.2d 482, 490-91 (4th Cir. 1981) (named plaintiff's claim is dismissed from that of the class due to the claim's final agency determination).

members may be such as to require that peculiar actions to be taken prior to the filing of a complaint in district court, such as exhaustion of administrative remedies.[21] In such instances, timely filing of a motion to intervene would long pass by the time the putative class member had exhausted all remedies, and the litigation either progressed to an advanced state or concluded, warranting denial of Federal Rule of Civil Procedure 24(b)'s discretionary intervention.

Not only is mandatory intervention not warranted, but it would be contrary to Federal Rule of Civil Procedure 24(b)'s discretionary intervention, and would effectively deny a putative class member his or her "day in court," resulting in a denial of due process and equal protection.

The "intervention only" rule's faults appear most egregious when applied to litigation of the nature in which these *amici curiae* are involved. Petitioner's compulsory intervention would deprive putative class members in *In Re Wheat Farmers Antitrust Class Action Litigation*, M.D.L. 129 and M.D.L. 452, of their right to assert claims against Continental Grain Company, even though the initial class actions were filed within one year of the circumstances giving rise to the causes of action, and the defendant knew the identity of the class members who sold directly to Continental. Petitioner's position is further compounded by its inequitable application to the unique facts of the *Wheat* case.

The litigation in which these *amici curiae* are participating involve three categories of party-plaintiffs: two

---

[21] *Luevaro* v. *Campbell*, 93 F.R.D. 68, 91 (D.D.C. 1981); *Barrett* v. *United States Civil Service Commission*, 439 F.Supp. 216 (D.D.C. 1977).

named plaintiffs who sought to intervene in the prior proceeding, but who were denied intervention; eighty-one intervenor-plaintiffs who were denied information of, and denied the opportunity to intervene in, the prior proceeding, but upon being informed timely sought to intervene; and over two hundred other individuals who either have been informed of their rights and have chosen not to participate, or still have not been contacted and informed of their rights in the litigation. To apply Petitioner's suggestion of compulsory intervention to the *Wheat* case would result in the evaporation of claims which the district court had ruled were dismissed without prejudice to file anew. The consideration given by the district court in the dismissal without prejudice was that those putative class members who wished to pursue their claims against the defendant would be given that opportunity in another lawsuit.

Mr. Williams attempted to informally intervene, and in fact was treated as a substitute representative for the class action, but, after reconsideration of the class action issue, his action was dismissed without prejudice. Mr. Powell was notified, pursuant to the district court's order, that he was a member of the certified class and afforded the opportunity to opt-out. He chose to participate, and subsequently was not informed that the class was later decertified, and his claim was dismissed without prejudice until the court of appeals reversed the trial court's enforcement of a local rule prohibiting communications with class members. *Zinser* v. *Continental Grain Company*, 660 F.2d at 762.

While the equitable principles tolling the statute of limitations announced in *American Pipe* would emphatically apply in the situation involving these *amici curiae*, it would be inappropriate to apply Petitioner's

inflexible suggestion without consideration of the consequences the many unforeseen, inequitable applications will have on a putative member's right to bring suit.

Any decision to limit the alternatives of a putative class member would involve substantial changes of policy in Federal Rules of Civil Procedure 23 and 24, and the putative class member's due process and equal protection rights. On balance, the principles of allowing initiation of a new suit by a putative class member outweigh the limited considerations warranting an "intervention only" rule where the defendant is fully apprised well in advance of the claims of the putative class member.

CONCLUSION

For the foregoing reasons, as well as in the interests of assuring that a putative class member's rights are not eroded, the *amici curiae* respectfully request that the Court affirm the opinion of the Fourth Circuit Court of Appeals and deny Petitioner's request for an "intervention only" policy.

Respectfully submitted,

WITHERSPOON, AIKIN & LANGLEY
Attorneys at Law
140 East Third Street
Hereford, Texas 79045
(806) 364-1100
By: James W. Witherspoon
JAMES W. WITHERSPOON
Attorneys for Amici Curiae, Jack Williams and Jerry Powell

Of Counsel:
JAMES E. ELLIOTT
BARBARA L. EMERSON

Dated: January 18, 1983.

LAW OFFICES

WHITEFORD, TAYLOR, PRESTON, TRIMBLE & JOHNSTON

2000 FIRST MARYLAND BUILDING
25 SOUTH CHARLES STREET
BALTIMORE, MARYLAND 21201
301 752-0987

December 10, 1982

James E. Elliott, Esquire
Witherspoon, Aikin & Langley
140 East Third Street
Hereford, TX 79045

Re: Crown, Cork & Seal Co., Inc.
v. Parker
Supreme Court No. 82-118

Dear Mr. Elliott:

I have your letter dated December 4, 1982 requesting permission to file an amicus curiae brief. Please accept this letter as the consent of petitioner, Crown, Cork & Seal Co., Inc. to file an amicus curiae brief on behalf of your clients (whom I understand to be a plaintiff and an intervenor) in the case of Williams v. Continental Grain Company, Civil No. 81-362 (W.D.Okla.).

Sincerely,

Richard J. Magid

RJM/kw

Law Offices
Michael D. Ramsey
Norris C. Ramsey, P.A.
717 Equitable Building
Calvert and Fayette Streets
Baltimore, Maryland 21202
Office 752-1696
752-1697

Norris C. Ramsey, P.A.
Res. 448-5480

Michael D. Ramsey
Res. 321-2514

December 16, 1982

James E. Elliott, Esq.
Witherspoon, Aikin & Langley
140 E. 3rd Street
Hereford, TX 79045

Re: Crown, Cork & Seal Co., Inc. v. Parker; No.: 82-118

Dear Mr. Elliott:

I am enclosing copies of the briefs filed in the Fourth Circuit Court of Appeals in the above case. With this letter, I am hereby granting your law firm permission to file amici curiae brief in support of Mr. Parker's position in the United States Supreme Court.

Thank you for your assistance.

Sincerely,

Norris C. Ramsey

Norris C. Ramsey, P.A.

NCR:pc
Encl.